

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL FRANCIS WELSH,

Defendant-Appellant.

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UNPUBLISHED

June 21, 2005

No. 252561

Van Buren Circuit Court

LC No. 03-013348-FH

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion), one count fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (force or coercion), and two counts of furnishing alcohol to a minor, MCL 436.1701. The trial court sentenced defendant to concurrent sentences of forty-five months to fifteen years' imprisonment for each CSC-III conviction, forty-two days imprisonment for the CSC-IV conviction, and forty-two days imprisonment for each furnishing alcohol to a minor conviction. Defendant appeals of right. We affirm.

**I. Sufficiency of Evidence**

Defendant argues that there was insufficient evidence to establish that he used force or coercion to overcome the victims. We disagree. This Court views the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This review is undertaken de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

"Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances." *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). Both victims were sixteen years of age at the time of the assaults and defendant was in his forties. Defendant was in a nominal position of authority over the victims because he paid them for odd jobs they did for him and he considered himself to be their "quasi-uncle." Defendant also acted in reliance on the position of special vulnerability of the victims. At the time of the assaults, the victims were staying overnight at defendant's home and were subject to his general control. They were also part of a seemingly close-knit group of teens that gathered almost every weekend at defendant's home. Further, defendant testified that he knew that at least one of the victims

was a quiet, introverted boy. Although defendant points to the victims' testimony that they said nothing at the time of the attacks, the victim's resistance is not required for a criminal sexual conduct prosecution. MCL 750.520i. Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to allow a rational trier of fact to find that force or coercion was proved beyond a reasonable doubt.

## II. Ineffective Assistance of Counsel

Defendant raises several claims of ineffective assistance of counsel and challenges the trial court's finding after a *Ginther*<sup>1</sup> hearing that defense counsel provided effective assistance to defendant. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that defense counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In so doing, the defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy. *Id.* at 600. The defendant must also demonstrate a reasonable probability that, but for defense counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first argues that defense counsel failed to make reasonable investigations into the prosecution's case and defense strategies thereby causing defendant to have to "violate his bond conditions in order to prove his innocence." However, defendant has not identified what a private investigator would have found or what prejudice resulted. Defendant's claim that he was prejudiced because he was compelled to follow the victims around with a video camera, despite a no-contact order, is also without merit. From defendant's testimony both at trial and during the *Ginther* hearing, it is apparent that defendant's actions were driven by a motive to intimidate and retaliate against the victims and their families rather than by any compulsion to investigate.

Defendant also argues that defense counsel failed to listen to an incriminatory audiotape that was admitted into evidence at trial. However, while defense counsel may not have listened to the audiotape, he had learned of its contents from a transcript.

Defendant also argues that defense counsel failed to call witnesses who would have discredited the victims. The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Defense counsel's decisions concerning what witnesses to call, and what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To overcome the presumption of sound trial strategy, defendant must show

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

that defense counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant has failed to demonstrate how these witnesses were invaluable to his defense or that their testimony would have affected the outcome of the proceeding.

Defendant further contends that defense counsel failed to "properly move for admission" of an exculpatory audiotape provided by defendant in order to impeach the victims. However, in denying defendant's motion for a new trial, the trial court determined the tape would not have been helpful to defendant. The trial court stated:

First, it is of horrible quality. The only clearly understandable voices on it belong to defendant (who does almost all the talking) and [defendant's sister-in-law]. Between roosters crowing, [the sister-in-law's] child crying, and fair-goers' scream, the tape is a listener's nightmare. Secondly, one gets the general impression in listening to the tape, that defendant, who was contacting a witness in blatant violation of a bond no-contact provision, was being very assertive with this teenager he is accused of violating. It does not impress one as a good thing for the fact-finder to hear, from the defendant's standpoint.

We agree that, because its bizarre nature, the audiotape would have been more prejudicial to defendant than helpful, defendant has not shown that defense counsel deprived him of a substantial defense by failing move for admission of the tape for impeachment purposes.

### III. Cumulative Error

Because defendant has not demonstrated any prejudicial errors, there is not merit to his contention of cumulative error. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly